Signed Copy

OCT 21 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-313

ROBERT W. KELLEY, et al., HENRY C. MAXWELL, JR. et al.,
Respondents,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, et al.,
Petitioners.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

K. HARLAN DODSON
DICK L. LANSDEN
1200 American Trust Building
Nashville, Tennessee 37201
Attorneys for Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, et al.

Of Counsel
HOOKER KEEBLE DODSON & HARRIS
Nashville Trust Building
Nashville, Tennessee 37201
WALLER LANSDEN DORTCH & DAVIS
1200 American Trust Building
Nashville, Tennessee 37201

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-313

ROBERT W. KELLEY, et al., HENRY C. MAXWELL, JR. et al.,
Respondents,

v.

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, C. R. DORRIER, Chairman, et al.,
Petitioners.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, heretofore filed with this Court a petition for writ of certiorari in this case.

This supplemental brief is filed pursuant to Rule 24(5) of the rules of this Court for the purpose of challenging to the attention of his Honorable Court the decision and

opinion of the Sixth Circuit Court of Appeals in the case of James Jonathan Mapp, et al. v. The Board of Education of the City of Chattanooga, etc., et al. decided and filed October 11, 1972 wherein the Sixth Circuit Court in effect reversed the captioned case. A copy of the opinion in Mapp v. Board of Education of the City of Chattanooga is attached hereto.

K. Harlan Dodson

K. HARLAN DODSON

Dick L Lansden

DICK L. LANSDEN

900 Nashville Bank & Trust Building
Nashville, Tennessee 37201

Attorneys for Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman

Certificate of Service

I hereby certify that a copy of the foregoing supplemental brief has been placed in the U. S. Mail to the Hon. Avon N. Williams, Jr., Hon. Julian W. Blackshear, Hon. Russell B. Ennix, 1414 Parkway Towers, Nashville, Tennessee 37201 and Hon. Jack Greenberg, Hon. James M. Nabit III, Hon. Norman J. Chachkin, Hon. Sylvia Drew, 10 Columbus Circle, New York, New York 10019 on this 20th day of October, 1972.

K. Harlan Dodson

K. Harlan Dodson

APPENDIX

Nos. 71-2006, 71-2007, 72-1443 and 72-1444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

James Jonathan Mapp, et al.,
Plaintiffs-Appellants
and Cross-Appellees,

v.

The Board of Education of the City of Chattanooga, etc., et al.,
Defendant-Appellee
and Cross-Appellant.

Appeal from United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed October 11, 1972.

Before WEICK and EDWARDS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. In their appeal in the main case the plaintiffs contend that the District Court erred in approving an interim high school plan which left the majority of black students in segregated schools; in approving a plan which left Junior High Schools and Elementary Schools racially identifiable; in approving continued racial identifiability of schools on constitutionally impermissible grounds; and in imposing a disproportionate burden on black students by ordering the closing of black schools and not white schools. The plaintiffs pray, therefore, that the case be remanded with instructions to enter detailed findings of fact with respect to these measures,

and in the absence of compelling justification that the plan be disapproved. They also ask us for a declaratory judgment.

The defendants contend that they were not in default, and that over the years they have always complied with all orders entered by the District Court, except the order from which both parties are now appealing. They contend that the order was unjustified since they had not been in default; that the order goes too far in requiring pairing and clustering of schools, and in requiring the expenditure of large sums of money to purchase buses to provide transportation to achieve a quota or racial balance in each and every school in the school system.

The Board of Commissioners of Chattanooga has appealed, contending that its due process rights have been violated by the order of the Court; that the Board of Commissioners is not bound by orders of the Court made prior to the time it was made a party to the litigation; and that it (Board of Commissioners) alone, and not the Board of Education, has the power and authority under Tennessee law to appropriate funds and levy taxes.

It is obvious to us that none of the parties is satisfied with the desegregation order of the District Court and that the main appeal is only a piecemeal appeal. For the reasons hereinafter set forth, and in compliance with the request of the plaintiffs we remand for further consideration and direct the District Court to present a plan which will finally determine this apparently-indeterminable litigation, which is now more than twelve years old. We do not grant to plaintiffs declaratory relief which they request, as this is beyond our jurisdiction as an Appellate Court. Plaintiffs' request for declaratory relief should be presented to the District Court.

I

HISTORY OF THE CASE

These appeals graphically illustrate developments in the law relating to school desegregation since *Brown I* and *Brown II* which, even after *Swann,* and related cases, have perplexed and confused judges, lawyers and legal scholars.[1]

In the present case the School Board has been subject at all times to the continuing jurisdiction and supervision of the District Court since 1960, and the District Judge since he took over the case has handled promptly all matters submitted to him.

The Board has co-operated in all respects with the District Court and has complied with all of its orders except those orders from which both parties have appealed and which involve the expenditure of large sums of public funds for busing.

In 1962 the Court approved a plan for the gradual desegregation of the Chattanooga public schools, which plan undertook to desegregate all of the elementary schools by 1965, and the Junior High Schools in 1966, all high schools in 1968, and Chattanooga Technical Institute in 1969. The Court found that the plan was "a prompt and reasonable start toward desegregation and as accomplishing full desegregation with all deliberate speed." Upon appeal, the judgment of the District Court was affirmed except as to technical and vocational courses, and the case was remanded for further proceedings with respect to them. *Mapp v. Board of Educ.,* 319 F.2d 571 (6th Cir. 1963).

---

[1] The Supreme Court, 1970 Term, 85 Harvard Law Review, p. 74 (1971); School Desegregation After Swann, A Theory of Governmental Responsibility, Univ. of Chicago Law Review No. 2, Winter 1972.

On March 29, 1965 the plaintiffs moved for further relief seeking an acceleration of the plan for desegregation which the Court granted, requiring all grades to be desegregated by September, 1966. On appeal we affirmed, except as to faculty assignments. *Mapp v. Board of Educ.*, 373 F.2d 75 (6th Cir. 1967).

On March 29, 1967, the case was restored to the docket for further consideration of the issue of faculty assignments.[2] Nothing then occurred until twenty-one months later when plaintiffs filed another motion for further relief.[3] About eleven months later plaintiffs filed a motion for immediate relief.

The Board answered the motions, stating that no decisions based on race had been made by it since the beginning of the academic year 1966-67, and further, since that time "no person has been excluded from any school because of race or color", and that the Chattanooga School System is a unitary system within the meaning of *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).[4]

In an opinion dated February 19, 1970, the Court discussed the Supreme Court decisions and decisions of this Court intervening between the date of its approval of the plans for desegregation, and the present time, and in view of disputed factual issues it ordered an evidentiary hearing.

On May 19, 1971, the Court rendered an oral opinion from the bench, in which it found that the school system

---

[2] Faculty assignments are no longer an issue.

[3] The motions for further relief were usually filed after rendition of new opinions by the Supreme Court.

[4] The Board was of the view that prior to *Swann*, it had no right to assign children on the basis of race.

was not unitary and suggested that the Board read some of the more recent decisions of the Supreme Court and of this Court, and ordered it to file another plan for desegregation.

In response thereto the Board filed such a plan containing provisions which it deemed necessary in order to comply with the order of the Court. The Court approved the plan with certain modifications, and both parties have appealed. *Mapp v. Board of Educ.*, 329 F. Supp. 1374 (1971). The plan as approved by the Court will require an initial capital outlay and operational expenditure of $468,126. 329 F.Supp. at 1386.

The history was detailed here in order to dispel any inference or claim that only the Board is responsible for all the delay in this case. The District Court did not blame the Board. It was of the view that the plans which it had previously approved would eliminate all vestiges of racial discrimination. It was only upon consideration of recent Supreme Court cases and decisions of this Court that the District Court concluded this had not been accomplished. The Court said:

> "In the intervening years very substantial progress has been made. Following appellate guidelines as they then existed, this Court believed upon each previous occasion it entered desegregation orders, first in 1962, then in 1965 and 1967, that all vestiges of the dual system of schools would be removed upon fulfillment of its orders and only a unitary system remain. Experience and appellate redefinition of the concept of a unitary school system have now mandated that further steps be taken to accomplish the full and final desegregation of the Chattanooga schools. As reflected by the undisputed evidence, a number of the Chattanooga schools remain racially identifiable" (329 Fed.Supp. at 1380).

In the areas of state action, in what manner and to what extent a dual system must be dismantled so as to become a unitary system, still is unclear. See footnote 1.

In our opinion, the fact that the Board obeyed the order of the Court and filed a plan which it believed the Court required, and which the Court did adopt with modifications, did not estop it from appealing from the judgment approving such plan.

On more than one occasion the Court has commented on the good faith of the Board.

In denying an application of counsel for plaintiff for attorney's fees, the Court said:

> "Turning finally to the motion for the allowance of attorney fees for all legal services performed on behalf of the plaintiffs since the filing of this lawsuit, the Court is of the opinion that the motion should be denied. In the absence of a showing of bad faith on the part of defendants, the Court is of the opinion that the allowance of attorney fees would not be proper. This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green v. School Board of New Kent County*, 391 U.S. 430, 20 L.Ed 2d 716, 88 S.Ct. 1689 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been

resolved, the Board has at all time complied or attempted to comply in good faith with the orders and directions of the Court."

II

FIXED RACIAL BALANCE AND QUOTAS IN EACH SCHOOL

Plaintiffs' plan, which they contend the Court erred in not adopting, was prepared by its expert witness, Dr. Michael Stollee. This plan, as stated in plaintiffs' brief, provides:

> "His [Dr. Stollee's] plan proposed the desegregation of elementary schools by use of pairing, grouping and clustering (Tr. 1583) resulting in distribution of no less than 30 or no more than 70 percent racial concentration of blacks or whites in every elementary school. His plan for junior high projected desegregation by redirecting the elementary feeder system, using the new groupings provided in his elementary plan (Tr. 1594). The distribution again was projected within the 70-30 range (Tr. 1890). He proposed rezoning the four general purpose high schools to achieve a racial distribution between 49.1% to 51.9% black (Tr. 1601). Transportation would be required for some, though not all students under each phase of the plan (Tr. 1645). His plan provided for the transfers of faculty to remove racial identifiability (Tr. 1609) and affirmative language for protection of teachers in the desegregation process (Tr. 1614). Construction policy in his plan provided that this school board would have an affirmative duty to place schools to further integration (Tr. 1620)."

This plan is "based upon an allowable 20% variation on either side of the total racial population with the result

that all schools would have at least 30% of each race and not more than 70% of the other race. (Tr. 1585)." Appellees' brief, page 48.

The plan which the Court approved achieves "a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions, the . . ." 329 F.Supp. 1374, 1382. As to the five exceptions, the Court found that the imbalance was not the result of past or present discrimination. A similar racial balance was provided for the Junior High Schools. Senior High Schools are still under consideration.

It is thus apparent that the plaintiffs' plan requires a fixed racial quota or balance in each and every school in the system, while the plan adopted by the Court requires such ratio in all but five schools. Both plans certainly do provide for "maximized integration."

We do not read *Swann* and related cases as requiring a *fixed* racial balance or quota in each and every school in a city, irrespective of the residential patterns of the city. Yet that is exactly what both of these plans provide.

If there was any doubt about *Swann* not requiring such quotas, the doubt was dispelled in Chief Justice Burger's opinion in *Winston-Salem Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221 (1971), ruling on an application for a stay.

The District Court was obviously impressed by the fact that in *Swann* the Supreme Court affirmed a judgment requiring massive busing to an extent much greater than that in the present case. We do not have before us the record in that case for purpose of making comparison, but we are certain that *Swann* involved a situation entirely different than the case at bar, because of the failure of the Board of Education in *Swann* to co-operate with the District Court, and it was clearly in default. We do

not believe that the Supreme Court in *Swann* was telling District Courts to adopt massive busing orders such as was involved there.

In reality, in cases involving massive busing the school children of both races are being used in an effort to integrate the races in the entire school system. This is a far cry from *Brown I* and *Brown II*, and involves impingement on the constitutional rights of the children who do not wish to be so used.

We do not consider that *Swann* issued a general command that all United States District Judges imitate and enforce the colorful and dramatic orders of Judge McMillan. It merely permitted what he had ordered.

In *Goss v. Board of Education*, 444 F.2d 632, 636 (6th Cir. 1971) we observed:

> "The District Court opinions reflect in observable measure Judge McMillan's doubts as to the genuineness of the school authorities' concern for the constitutional rights of both the black and white school children of Charlotte and Mecklenburg Counties. The broadness of their commands bespeak some motivation of reprisal. . . . We, therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the *Mecklenburg* rule, it by no means directed that its commands be obeyed everywhere."

In the case at bar the District Judge held, as set out hereinabove, that the School Board has at all times acted in good faith and has at all times "complied or attempted to comply with the orders and directions of the Court."

We do not believe that Boards of Education can be faulted for the residential patterns of a city, or for the heavy concentration of black or white population in cer-

tain areas, or for the mobility of both races. These are matters over which the school system has no control, neither does it have authority to assume such control. It has always been the practice in the American educational system, until recently, to locate schools near residences, and these schools have been known as neighborhood schools. Neighborhood schools enabled parents of children to participate in the school's operation, enabled the children to engage in other activities and to associate with their friends and neighbors, and even to walk to and from school. Destruction of the neighborhood school system deprives both parents and their children of these advantages, and can even lower the quality of education. "School Desegregation After Swann," Univ. of Chicago Law Review, Vol. 39 No. 2, Winter 1972, at 444.

III

BURDEN OF PROOF

Ordinarily where a dual system has been maintained, the burden of proof rests upon the School Board to establish that present racial imbalances in a particular school are not the result of past discriminatory actions of either the Board or even the state, although the cases are not very clear as to just how or in what manner the Board can ever meet such a heavy burden. But in a case like ours, where the Board has complied with the desegregation orders of the Court, and the plaintiffs have filed motions for further relief, it would seem to us to be only fair that plaintiffs should have the burden to prove that they are entitled to such further relief. The Board ought not to have the burden of disproving every contention which the plaintiffs may see fit to make in this case. In our judgment the Court erred in placing on the defendants the burden of proof in resisting plaintiffs' motion for further relief.

IV

MAXIMIZING INTEGRATION

The District Court further required the Board to establish that it had taken affirmative action to "maximize integration" in all feasible ways as required by *Kelley* and *Robinson*. The Supreme Court in *Davis* held that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation." We have not found where the Supreme Court has used the words "maximize integration". If maximize desegregation and maximize integration mean one and the same thing, then the use of these words would be proper. The difficulty is that the District Court may well have understood the words to require integration of the races by fixed numbers or quotas in each public school in the system, regardless of where the pupils live, and regardless of their economic circumstances. We do not believe the law requires any such thing.

It should be pointed out that there is a marked distinction between voluntary busing and induced or forced busing in the effect on the children involved and their parents. No one can have any objection to the school system furnishing transportation from the child's residence to the school nearest thereto. It is something entirely different when the child by reason of a Court order is assigned away from his neighborhood school and is required to be transported to another school (whether by his parents' car or by induced busing) some distance away from his home.

Brown I speaks of the feeling-of-inferiority effect on children as the result of discriminatory state action where the children are not permitted to attend certain public schools because of the color of their skin. This condition would seem to persist still if children of both races are

prohibited from attending schools nearest to their residences, merely because of the color of their skin, and are required to be taken elsewhere to school.

V

PRACTICALITIES

In considering desegregation plans the District Court must take into account the practicalities of the proposals. These include the cost thereof, how such proposals may affect the rights of the children involved in the assignments, induced busing, and the educational achievement of such proposals.

Boards of Education do not have unlimited funds to adopt any program which they please. Funds can be raised by taxation and appropriation. In the present case the Board of Education does not have the power to levy taxes or to appropriate funds to carry out its programs. Only the Board of Commissioners of the city has such power and authority. That Board was not made a party to the case in the District Court until after the desegregation orders had been entered by the Court. We would assume that the Board of Commissioners has already appropriated the funds for the 1972-73 school year. If so, we do not know how an expenditure of $500,000 for buses would affect operation of the schools. The District Court has not ordered the Board of Commissioners to appropriate funds to provide for the transportation of pupils, and we do not consider in this appeal the question whether it has the power to enter any such order.

In our judgment the mere fact that the District Court at one time considered the Board of Education in compliance, did not preclude the Court from holding otherwise when considering the case in the light of more recent decisions.

Upon remand, the Court no doubt will want to consider the recent article by David J. Armor on "The Evidence On Busing." in *The Public Interest*, No. 28, Summer 1972, page 90, which article contains some evaluations of the effects of busing on black pupils. In *Brown I* the Supreme Court considered articles by sociologists, and we would see no objection to the District Court doing likewise.

In our judgment a quota system can invidiously discriminate in favor of one race against other races. Such a system can lower the quality of education and educational achievement and polarize the races.

VI

THE DISSENT

We do not understand the purpose of attaching as Appendix "A" Tennessee Statutes which are no longer in force because the Supreme Court of Tennessee held the same unconstitutional in 1956. *Roy v. Brittain*, 201 Tenn. 140, 257 S.W.2d 72. Nor do we understand the purpose of the attachment of "A Brief Critique of Dr. Armor's 'The Evidence on Busing'."

The complete history of the de jure system in the Tennessee public schools is well known and has been portrayed fully in previous decisions of this Court, which decisions are cited in the dissent.

Dr. Armor's article, as well as the critique, had best be considered in the first instance upon the remand which we ordered.

The decisions of individual Justices of the Supreme Court on applications for a stay under the provisions of § 803 of the Education Amendments of 1972, Pub.L. 92-318, § 803 (June 23, 1972) are not relevant here in view of

our remand of these appeals to the District Court for further consideration.

The Education Amendments are relevant, however, for consideration by the District Court on the issue of practicality because of provisions therein which operate to deprive the Board of Education of federal funds to carry out the busing order of the District Court.

While wide and almost unprecedented authority and discretion have been conferred on District Courts in their consideration of school desegregation cases, by the very nature of things such authority is not unlimited.

There seems to have grown up across the land an idea by most United States District Judges that extensive busing must be ordered to obey the commands of *Brown I* and *II*. They turn to *Swann* for their authority. *Swann* did not decide anything of the kind. In the case before us, as was true in other decisions, this Court had approved the conduct of various Boards of Education who made an honest effort to establish a unitary system. If now every order involving schools requires busing, the question may well be asked, "What next?"

As we pointed out, the District Court previously found compliance by the Board of Education with its desegregation order. It was only upon the rendition of new decisions by either the Supreme Court or this Court, that the District Court determined that such compliance had not achieved a unitary system. Such system cannot be achieved, according to the plaintiffs, until there is a fixed racial quota in each and every school in the system, irrespective of where the children live. Their program seems to be based on a head count, and requires busing, with little or no regard for the wishes of the children or their parents, the cost and feasibility of such program, the effect on existing educational programs, educational achieve-

ment of the children, or their safety, or their constitutional rights.

Remanded for further consideration.

EDWARDS, Circuit Judge, dissenting. Much as I respect my two brothers who constitute the majority of this panel, I would be less than candid if I did not say that I believe their opinion in this case represents a repudiation of settled constitutional law in *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis v. Board of Commissioners*, 402 U.S. 33 (1971) and *Brown v. Board of Education I*, 347 U.S. 483 (1954); *Brown v. Board of Education II*, 349 U.S. 294 (1955), to name only four of the most important and controlling Supreme Court precedents.

It is in my view also completely inconsistent with opinions of this court in which the great majority of the members of this court have joined: *Monroe v. Board of Commissioners of City of Jackson*, 427 F.2d 1005 (6th Cir. 1970); *Robinson v. Shelby County Board of Education*, 442 F.2d 255 (6th Cir. 1971); *Davis v. School District of the City of Pontiac*, 443 F.2d 573 (6th Cir. 1971); *Oliver v. School District of the City of Kalamazoo*, 448 F.2d 635 (6th Cir. 1971); *Kelley v. Metropolitan County Board of Education*, ... F.2d ... (6th Cir. 1972) (Decided May 30, 1972); *Northcross v. Board of Education of Memphis City Schools*, ... F.2d ... (6th Cir. 1972) (Decided August ...., 1972). Under all of these cases the facts in this case call for our affirmance of the District Judge's opinion and judgments. As I see it he has done nothing more than follow the clear mandate of the Supreme Court and this court in the cases cited above.

If there could be any doubt about the continued validity of the cases cited above, it would have to be due to quite recent changes in composition of the Supreme Court or

to the adoption of § 803 of the Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972), by the United States Congress. I feel any such doubt has been completely dispelled by the actions of the Supreme Court this summer.

On the § 803 issue an opinion of Mr. Justice Powell denying application for a stay in the Augusta, Georgia, desegregation case is directly in point:

> This reapplication is premised solely on the contention that a stay is required under § 803 of the Education Amendments of 1972. That section reads in pertinent part as follows:
>
> "in the case of any order on the part of any United States District Court which requires the transfer or tranportation of any student . . . *for the purpose of achieving a balance among students with respect to race* . . ., the effectiveness of such order shall be postponed until all appeals . . . have been exhausted. . . ." Education Amendments of 1972, Pub. L. 92-318, § 803 (June 23, 1972) (emphasis added).

By its terms, the statute requires that the effectiveness of a district court order be postponed pending appeal only if the order requires the "transfer or transportation" of students "for the purpose of achieving a balance among students with respect to race." It does not purport to block all desegregation orders which require the transportation of students. If Congress had desired to stay all such orders it could have used clear and explicit language appropriate to that result.

In § 802(a), which precedes § 803, Congress prohibited the use of federal funds to aid in any program for the transportation of students if the design of the program is to "overcome racial imbalance" or to "*carry out a plan of desegregation.*" Education Amendments of 1972, Pub.

L. 92-318, § 802(a) (June 23, 1972) (emphasis added). It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance.

In light of this Court's holding in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), it could hardly be contended that Congress was unaware of the legal significance of its "racial balance" language. In that case the school authorities argued that § 407(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000c-6, restricted the power of federal courts in prescribing a method for correcting state-imposed segregation. THE CHIEF JUSTICE's interpretation of § 407(a), which applies only to orders "seeking to achieve a racial balance," is controlling here:

> "The proviso in [§ 407(a)] is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from the courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation,' where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." 402 U. S., at 17-18 (emphasis in original).

* * * * * * *

For the purpose of acting on this application, I accept the holdings of the courts below that the order was entered to accomplish desegregation of a school

system in accordance with the mandate of *Swann* and not for the purpose of achieving a racial balance. The stay application must, therefore, be denied.

Drummond v. Acree, ... U.S. ... (1972) (Decided September 1, 1972).

Subsequent to Justice Powell's denial of a stay, the same motion was presented to Chief Justice Burger and on September 8, 1972, was denied by him. There is no legal or constitutional difference between the Augusta case (*Acree v. County Board of Education of Richmond County, Georgia,* 458 F.2d 486 (1972)) and the one we deal with from Chattanooga.

Similar denials of stays have been entered in relation to similar § 803 applications by Mr. Justice Rehnquist on August 22, 1972, in the case of Oklahoma City (*See Board of Education of Oklahoma City v. Dowell,* 338 F. Supp. 1256 (W.D. Okla. 1972)) and on August 25, 1972, in the case of Nashville, Tennessee (*See Kelley v. Metropolitan County Board of Education of Nashville, Tenn.,* 436 F.2d 856 (1970), *on remand,* ... F. Supp. ... (M.D. Tenn. 1971), ... F.2d ... (6th Cir. 1972)).

Another such denial of a § 803 stay was entered September 5, 1972, by Mr. Justice Douglas in *Guinn v. Kelley, Supt. of Schools of Clark County School District, Nevada,* ... U.S. ... (1972).

See also Keyes v. Denver School District, 396 U.S. 1215 (1969); *Winston-Salem/Forsyth County Board of Education v. Scott, et al.,* 404 U.S. 1221 (1971); *Guey Heung Lee v. Johnson,* 404 U.S. 1215 (1972); *Jefferson Parish School Board v. Dandridge,* 404 U.S. 1219 (1971).

All of these denials of stay are fundamentally based upon the continued vitality of the four unanimous Supreme Court opinions cited in the first paragraph of this dissenting opinion.

In the last opinion in chambers cited above, Mr. Justice Marshall said:

> The devastating, often irreparable, injury to those children who experience segregation and isolation was noted 17 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954). This Court has repeatedly made it clear beyond any possible doubt that, absent some extraordinary circumstances, delay in achieving desegregation will not be tolerated. See, *e. g., Alexander v. Holmes County Board of Education*, 396 U. S. 19 (1969); *Carter v. West Feliciana Parish School Board*, 396 U. S. 226 (1969); *Keyes v. School District No. 1*, 396 U. S. 1215 (1969) (BRENNAN, J., vacating stay).
>
> *Jefferson Parish School Board v. Dandridge, supra*, at 1220.

There are no "extraordinary circumstances" in the instant appeal.

This is a classical school desegregation case concerning a city, Chattanooga, which historically has maintained a dual school system segregated by race, and a state, Tennessee, which historically by law has sought to require its school boards to maintain segregated school systems. (See Appendix A.) The District Court order appealed from requires the appellant Board of Education of the City of Chattanooga to proceed with desegregation of its elementary and junior high school systems by the fall term of 1972 and to propose a plan for doing the same in relation to its high school system by June 15, 1972.

Three separate appeals have been perfected from the District Judge's order. In the main cases, 71-2006 and 71-2007, the Board of Education appeals and the plaintiffs appeal from the District Judge's desegregation order addressed to the Chattanooga Board of Education. In No. 72-1443, the Board of Commissioners of Chattanooga (the

city council) appeals from the same order referred to above, but on the additional ground that it, by implication, would require an expenditure of city funds on the part of the Board of Commissioners of Chattanooga, which has only recently been made an intervening defendant.

The appeals in these cases are here on the merits, along with a motion for stay of the District Judge's order pending appeal. The positions of the principal appellants are as follows:

Plaintiffs' appeal asserts that the delays in integrating the Chattanooga school system have been endless; that the order of the District Judge now entered will not accomplish the desegregation contemplated by applicable Supreme Court cases; that there is no final order as yet for desegregation of the four high schools which are, according to plaintiffs, still clearly segregated, and that the order entered by the District Judge, by dint of closing several black schools and requiring the black children in the youngest grades to be bused to white schools, invidiously discriminates against them in the remedial measure chosen.

Appellant School Board contends that the District Judge's order misinterprets Chief Justice Burger's opinion for the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), by proposing a plan directed to achieve "a racial balance," and further, improperly requires transportation of school children.

The Board of Commissioners argues that the effect of its being made a party defendant is to make it vulnerable to contempt proceedings if it fails to appropriate the necessary funds to finance the plan contemplated by the District Judge's order. The Board of Commissioners points out that it had not been a party to the principal litigation until very late in the proceedings and had not had (although it requested it) an opportunity to litigate the

issues. The Board of Commissioners also puts forward the identical arguments as to the merits of the case advanced by the Board of Education of the City of Chattanooga.

The lengthy history of this litigation is a necessary predicate to discussion and decision of the stated issues.

Procedural History

Apr. 6, 1960—This complaint was filed.

Nov. 13, 1961—*Mapp v. Board of Education of City of Chattanooga*, 295 F.2d 617 (6th Cir. 1961), affirmed a District Court order directing the Board to file a desegregation plan.

Apr. 20, 1962—*Mapp v. Board of Education of City of Chattanooga*, 203 F.Supp. 843 (E.D. Tenn. 1962). District Court orders Board to desegregate its schools within a period of not more than eight years. Court retained ju- 1962), except for provisions relating to risdiction. *Aff'd*, 319 F.2d 571 (6th Cir. technical and vocational courses.

Nov. 26, 1963—Order entered desegregating Chattanooga Technical Institute.

Dec. 31, 1963—Further order desegregating all vocational and technical courses.

Mar. 29, 1965—Plaintiff moves for further relief, seeking acceleration of the plan for desegregation, including desegregation of faculty and supervisory personnel.

Feb. 27, 1967—*Mapp v. Board of Education of City of Chattanooga*, 373 F.2d 75 (6th Cir. 1967). District Court order accelerating desegregation affirmed, except with regard to

faculty assignments for which further proceedings were ordered.

Mar. 29, 1967—Case restored to the docket for further consideration of the issue of faculty assignments.

Dec. 31, 1968—Plaintiffs file motion for further relief, seeking temporary injunctive relief, to be followed by permanent injunction.

Nov. 14, 1969—Plaintiffs file motion for immediate relief

Feb. 19, 1971—Evidentiary hearing set for April 1, 1971 on foregoing plaintiffs' motions filed.

Apr.-May 1971—Hearings held on plaintiffs' motions.

May 19, 1971—Opinion issued from the bench. (1) School system was found to be unconstitutional; (2) Desegregation plans ordered.

July 26, 1971—Memorandum and findings entered by District Court. (Plan submitted by Board approved concerning provisions for elementary and junior high schools. Tentative approval for portion of Board plan respecting high school.)

Aug. 5, 1971—District Court files order directing implementation of Board plan approved July 26, 1971, where reasonably feasible by 1971-72 school year. Time was allowed for delayed implementation where staffing and transportation equipment had to be acquired.

In the very first consideration of this case by this court, Judges Miller, Weick and O'Sullivan noted:

> It was not controverted that the Board has pursued a policy of operating a biracial school system; that the

system was established almost a century ago and has been continued by the members of the present Board. Although more than five years have elapsed since the Supreme Court held racial segregation in the public schools to be a violation of constitutional rights no plan for desegregation had been adopted by the Board until ordered by the Court.

The Board contends that after the second Brown decision it publicly announced its policy of compliance with the decision and engaged in extensive educational activities to elucidate said policy to the people of the community in order to bring about public acceptance of desegregation. It claims that these activities constituted the first step in its plan of implementation of said policy. It asserts that it had not adopted any plan for desegregation because the people in the community were not ready for it and would not accept it. *Mapp. v. Board of Education of City of Chattanooga*, 295 F.2d 617, 618 (6th Cir. 1961). (Footnotes omitted.)

This court upheld the District Judge in rejecting a Board desegregation plan which was held to be "indefinite as to when desegregation would take place in all of the schools" and in requiring the Board to file an alternative plan to accomplish same.

This record clearly shows that the Board of Education's progress in dismantling its dual school system has been minimal from 1962 down to date. It also shows that if the Board of Education's 1971 plan as far as elementary schools and junior high schools is promptly and effectively carried out, a unitary school system as to these units will result.

Judge Wilson's opinion accurately describes what this record contains concerning these comparisons as far as the elementary schools and the junior high schools are concerned:

Elementary Schools

During the school year 1970-71, the Chattanooga School System operated 33 elementary schools. Of the ten former black elementary schools within the system, four remained all black and a total of only 30 white students attended the other six. In the 23 former white elementary schools there were 13,250 white children and 3,446 black children. Four former white elementary schools (Cedar Hill, Normal Park, Pineville, and Rivermont) remained all white. Barger had only two black students and East Lake had only three black students. Two former white elementary schools (Avondale and Glenwood) had changed to all black schools, having only three white students between them. The remainder of the former white elementary schools had ratios of black students varying from a low of 4% to a high of 64%.

The School Board proposes the accomplishment of a unitary system within the elementary schools by the closing of five elementary schools, by the pairing of 16 elementary schools, by the clustering of six elementary schools, by the rezoning of three elementary schools, leaving the attendance zones of only three elementary schools unchanged. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions (Barger—20% black and 80% white; Carpenter—86% black and 14% white; Long—16% black and 84% white; Rivermont—12% black and 88% white; and Sunnyside—15% black and 85% white). *Mapp v. Board of Education of City of Chattanooga, Tenn.*, 329 F. Supp. 1374, 1381-82 (E.D. Tenn. 1971).

Junior High Schools

During the school year 1970-71, the Chattanooga School System operated 12 junior high schools. Of the four formerly black junior high schools within the system, two remained all black and a total of only 9 white students attended the other two. In the eight formerly white junior high schools, there were 3,341 white students and 908 black students. One formerly white junior high school (East Lake) had only one black student. The remainder of the formerly white junior high schools had ratios of black students varying from a low of 8% to a high of 70%.

The School Board proposes the accomplishment of a unitary system within the junior high schools by closing two junior high schools and by rezoning the remaining ten junior high schools, tying them into the restructured elementary school system. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in all but three junior high schools. Those three schools are Hardy, with 73% black and 27% white, Dalewood, with 29% black and 71% white, and Long, with 15% black and 85% white. *Id.* at 1383.

After noting a satisfactory Board of Education plan which desegregated the Technical High School, the District Judge described the continuing problem of the other four racially segregated high schools:

While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that

time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. *Id.* at 1385.

None of the facts which we have quoted from the District Judge's opinion are disputed by the parties and the record amply supports them.

Plaintiffs' Exhibit 3, the accuracy of which is undisputed, shows that as of the close of this record, 9,223 black students were attending previously all black schools, along with 48 white students. Using 90% to indicate a predominantly one-race school, we find the following situation confronting the District Judge and this court:

Previously all black schools still predominantly one race (90% or more black):

Elementary schools	10 out of 10
Junior high schools	4 out of 4
Senior high schools	2 out of 2

Previously all white schools still predominantly one race (90% or more white):

Elementary schools	12 out of 23
Junior high schools	2 out of 8
Senior high schools	1 out of 2

(These computations exclude the Technical High School.)

From Exhibit 3 we also compute the following comparisons concerning the total school population of Chattanooga's schools:

1962-63

99.6% of black children attended schools in which 100% of the students were black.

100% of white children attended schools in which 99.7% of the students were white.

1970-71

72.8% of black children attended schools in which 99.5% of the students were black.

99.6% of white children attended schools in which 79.5% of the students were white.

This record makes clear that in the sixteen years since *Brown v. Board of Education*, 349 U.S. 294 (1954), and in the eleven years of litigation between 1960 and 1971, the results may be summarized as follows:

1) Minimal integration of some previously all white elementary and junior high schools.

2) Complete failure to desegregate the previously all black elementary and junior high schools.

3) Complete failure to desegregate the high schools.

I would test the District Judge's order on this appeal against the Constitutional mandate of "equal protection of the law." The objective sought has been recently thus described by Chief Justice Warren Burger, writing for a unanimous United States Supreme Court:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be

corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437-438.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann v. Board of Education*, 402 U.S. 1, 15 (1971).

This record demonstrates beyond doubt that the Chattanooga "school authorities [have] fail[ed] in their affirmative obligations" to eliminate racial discrimination "root and branch." It mandates our prompt affirmance of the order of the District Judge adopting the desegregation plan finally proposed by appellant Board of Education of Chattanooga as far as the elementary and junior high schools are concerned.

The appellate issues stated in the principal cases (Nos. 71-2006 and 71-2007) by defendant-appellant Board of Education of City of Chattanooga, although phrased as ten separate issues seems to me to be rephrasing of the issues this court dealt with recently in *Kelley v. Metropolitan Board of Education*, ... F.2d ... (6th Cir. 1972) (Decided May 30, 1972, Nos. 71-1778-79). In *Kelley* this court said:

II. The Ratio and Residual Effect Issues

Where a school system has been deliberately constructed on a segregated basis by state action, a duty inheres in the School Board to do more than to establish rules fair

on their face which simply serve to perpetuate the effects of such segregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26, 28 (1971).

The record in this case supports the District Judge's findings that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until the close of the record—if not beyond. The record also discloses a background of racial discrimination by means of state law which motivated much of the school segregation. (See Appendix A)

The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system.

Nor, of course, does it alter the duty of the District Court on default of the school board to require production of such a plan and order it into effect. Chief Justice Burger put the matter thus in the *Davis* case:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. School Commissioners of Mobile County, supra* at 37.

Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. *See Swann v. Charlotte-Mecklenburg Board of Education, supra* at 16, 23-24. The District Judge in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error.

An earlier finding of "good faith" does nothing to excuse the defaults and failures shown by this record.

> "The measure of any desegregation plan is its effectiveness." *Davis v. School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971). *See also Green v. County School Board,* 391 U.S. 430, 439 (1968). *Kelley v. Metropolitan Board of Education, supra* at 21-22 (Slip opinion). (Footnote omitted.)

In the instant case, of course, as distinguished from the *Kelley* case, the flexible ratio chosen as a guide to its plan (no race to be represented by less than 30% or more than 70% of the student body) was one chosen by appellant Board of Education of Chattanooga, and the plan actually adopted by the District Court was one put forward by the appellant also. Since appellant, in spite of proposing the plan, has never put it into effect and is now by this appeal continuing to resist ever having to do so, it can hardly rely upon the plan as curing its default.

As to this aspect of the case, the Board of Education's failure to implement its own plan simply makes more obvious its "default" in the sense that term is used in *Swann v. Board of Education,* 402 U.S. 1, 15-16 (1971). Finally, it is worth noting that of the 49 schools operated during the 1970-71 school year, 42 had a racial composition outside the flexible ratio suggested by the Board itself in its proposed desegregation plan.

What was said concerning the plaintiffs' appeal in *Kelley* is likewise applicable to the appellate issues stated by plaintiff-appellants in this case:

IV. Plaintiffs-Appellants' Plan

Our review of this record convinces us that the District Judge's choice of the HEW plan as opposed to plaintiffs' plan was well within his judicial discretion. It may not be ideal, but to us it seems clearly to be a plan for ending a dual school system based on race and substituting therefor a unitary one. It promises to work and to work *now. Green v. County School Board of Kent County,* 391 U.S. 430 (1968).

V. Plaintiffs-Cross-Appellants' Discrimination Claim

Plaintiffs-Cross-Appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.

The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6.[1] In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann. Swann v. Board of Education, supra* at 10. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can appropriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

It may be that this is a temporary expedient or it may be that there are practical reasons to justify it

[1] Plaintiffs-appellants' invidious discrimination claim is far less specific in this case than in *Kelley*.

for longer duration. In any event, any adverse effects of this aspect of the plan can, of course, likewise be brought to the District Judge's attention when the case is back before him. *Kelley v. Metropolitan Board of Education, supra* at 25-26 (Slip opinion).

While the *Kelley* language quoted above disposes of the basic appellate issues brought here by both defendant-appellant and plaintiffs-appellants, a special comment must be made concerning the status of the plan for desegregating the senior high schools. As to the Board of Education's plan in this regard, the District Judge plainly found it unsatisfactory other than as a temporary expedient and ordered another plan to be presented by June 15, 1972—a date which followed oral argument of this appeal. While I would affirm his order, limited as it is, I would emphasize that no approval is thereby implied as to the Board of Education's plan for the high schools in constitutional terms. I do not consider that any final order concerning a final desegregation plan for the high schools has as yet been presented to us.

I now turn to the appeal by the Board of Commissioners of the City of Chattanooga in No. 72-1443. To the extent that the brief of the Board of Commissioners seeks to argue basically the same issues set forth in the appeal of the Board of Education, said issues are disposed of above. As to the Board of Commissioners' contention that it has been denied due process, some additional facts need to be recited. This record shows that *over six months after the basic order appealed from in this case had been entered on August 5, 1971*, the following events occurred:

Jan. 14, 1972—Circuit Court of Hamilton County, Tenn. entered an order enjoining the City of Chattanooga from expending funds for purchase of transportation equipment to be used to achieve "racial balance." The state court's

ruling followed a complaint filed by a resident of Chattanooga. The state court decided that expenditure of funds by the City for transportation "to achieve racial balance" contravened TCA 49-2201, which provides:

> "49-2201. Power of boards to provide transportation.—
>
> • • •
>
> "Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another."

Jan. 24, 1972—The City of Chattanooga declared that it would not appeal the state court injunction and would consider it binding.

Jan. 25, 1972—The United States District Court ordered plaintiffs to join as defendants in federal suit all parties in state court suit. The District Court also ordered the plaintiffs to petition the court for an order directing the defendants to show cause why they should not be enjoined from complying with the state court injunction.

Jan. 26, 1972—The City of Chattanooga, the Mayor, the City Commissioners, the City Auditor, the state court plaintiff, Grannan, and counsel in the state court suit were ordered joined

as defendants in the District Court proceedings.

Jan. 28, 1972—Hearing on order to show cause why defendants should not be enjoined from complying with the state court injunction.

Feb. 4, 1972—District Court entered an order enjoining all parties from seeking either to enforce or to comply with the state court injunction in any manner. Further reports concerning plans for desegregation of the high schools ordered.

Feb. 11, 1972—The Board of Commissioners filed a motion for new trial or rehearing relating to show cause order of January 28, 1972. City in same motion sought rehearing relating to their responsibility for appropriating funds for purchase of buses.

Feb. 25, 1972—District Court denies motions for new trial or rehearing.

I do not think that these proceedings pending appeal served to change or alter in any way the posture of the Board of Commissioners in relation to the basic desegregation order of the court. The District Judge's actions were plainly taken to defend the jurisdiction of the court. They were designed only to serve the purpose of freeing the Board of Commissioners from any possible legal restraint that the obviously unconstitutional order of the Circuit Court of Hamilton County might have been thought to have imposed.

Chief Justice Burger's opinion for a unanimous Supreme Court in *Board of Education v. Swann*, 402 U.S. 43 (1970), discussed and held constitutionally invalid a North Carolina antibusing statute like TCA 49-2201:

> [T]he flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green v. County School Board*, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.
>
> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann, supra*, at 29, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. *Board of Education v. Swann, supra* at 46.

I perceive no due process deprivation of any kind concerning the proceedings pending appeal referred to above. (*See Kelley v. Metropolitan Board of Education*, ... F.2d ... (6th Cir. 1972) (Slip opinion pp. 24, 30)).

The Board of Education of the City of Chattanooga was and is clearly the proper party defendant in this school desegregation case. The obligations of the Board of Commissioners of the City of Chattanooga imposed by state law pertaining to financing the schools and levying taxes were neither increased nor diminished by the District

Judge's orders of January 26, 1972 and February 4, 1972. The Board of Commissioners was intimately aware of this litigation during all its lengthy history. Its efforts to secure a retrial of the fundamental desegregation order were completely out of time and without merit.

I refrain from extended comment upon Section V of my brothers' opinion entitled *Practicalities*. To me this section seems to be reargument of decisions made by the Supreme Court 17 years ago in *Brown v. Topeka, supra*, which have many times been reaffirmed and which this court has no power to overrule. The adverse effects of racially segregated dual school systems are not likely to be overcome without opposition or without inconvenience. Neither "practicality" has ever deterred the United States Supreme Court from ordering the dismantling of such a system by use of a desegregation plan "which promises realistically to work, and promises realistically to work now." *Green v. County School Board*, 391 U.S. 430, 439 (1968); *Alexander v. Board of Education*, 396 U.S. 19 (1969).

The result of my brothers' opinion, unless it is reversed en banc, will be to delay desegregation of the Chattanooga schools by at least another year. But meantime it will mislead many people to expect a change in constitutional law which this court has no power to accomplish.

Typical of the arguments which seem to me to be addressed to overruling *Brown v. Topeka, supra*, is reference to the Armor article "The Evidence on Busing." Because I consider it completely irrelevant to our current legal problems, I refrain from comment beyond printing Professor Thomas F. Pettigrew and his co-authors' answer to the Armor article as Appendix B to this opinion.

I would affirm the judgments of the District Court in these appeals.

APPENDIX A

CHAPTER 37

SEGREGATION OF RACES

SECTION.

49-3701—49-3703. [Unconstitutional.]

49-3701—49-3703. [Unconstitutional.]

Compiler's Note. Under the decision of Roy v. Brittain (1956), 201 Tenn. 140, 297 S. W. (2d) 72, the statutes providing for the compulsory separation of races in the field of public education are no longer in effect, and therefore these sections have been omitted. They read:

49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. [Acts 1901, ch. 7, § 1; Shan., § 6888a37; Code 1932, § 11395.]

49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. [Acts 1901, ch. 7, § 2; Shan., § 6888a38; Code, § 11396.]

49-3703. Penalty for violations.—Any persons violating any of the provisions of this chapter, shall be guilty of a

misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. [Acts 1901, ch. 7, § 3; Shan., § 6888a39; mod. Code 1932, § 11397.]

49-3704. [Unconstitutional.]

Compiler's Note. This section was held unconstitutional in Kelly v. Board of Education (1959), 270 Fed. (2d) 209 and is, therefore, omitted. It read:

49-3704. Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race. [Acts 1957, ch. 11, § 1.]

CHAPTER 22—TRANSPORTATION OF SCHOOL CHILDREN

SECTION.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.

49-2210. Color and markings of buses.

49-2213. Speed limit.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.—Boards of education may provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall

not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education with the approval of the state commissioner of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court; provided further, that said boards in employing school transportation personnel and in contracting for transportation services with persons owning, equipment are hereby authorized to enter into contracts for such services for periods of time as long as, but not exceeding, four (4) years from the date of making such contracts, it being the purpose of this section to permit a reasonable degree of employment security for such school transportation personnel.

Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another. [Acts 1947, ch. 92, § 1; 1949, ch. 233, § 1; C. Supp. 1950, § 2495.1 (Williams § 2495.2 Acts 1957, ch. 10, § 1; 1957, ch. 400, § 1; 1970 (Adj. S.), ch. 491, § 1.]

Amendment. The 1970 amendment added the last paragraph to this section.

Effective Date. Acts 1970 (Adj. S.), ch. 491, § 2. February 27, 1970.

[Note that a statute similar to the proviso in the last paragraph of the statute above was held unconstitutional by the United States Supreme Court. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971).]

APPENDIX B

A BRIEF CRITIQUE OF DR. ARMOR'S "THE EVIDENCE ON BUSING"

Marshall Smith
Harvard University
Clarence Normand
Harvard University
Elizabeth L. Useem
Boston State College
Thomas F. Pettigrew
Harvard University

Release Date to Mass Media: Monday, September 11, 1972.

Publication: To appear as part of rebuttal article in *The Public Interest*, Winter Issue, 1972-1973.

An Overview

The article begins by establishing unrealistically high standards by which to judge the success of the racial desegregation of public schools. "Busing" works only if it leads in one school year to increased achievement, aspirations, self-esteem, inter-racial tolerance, and life opportunities for black children. And "busing" must meet these standards in *all* types of interracial schools; no mention or measurement is made of the distinction between merely desegregated and genuinuely integrated schools.

This "integration policy model," as it is labeled, is *not* what social scientists who specialize in race relations have

been writing about over the past generation. Indeed, these criteria must surely represent the most rigid ever employed for the evaluation of a change program in the history of public education in the United States.

To load the gun further, the anti-busing paper next presents selected findings from selected studies as "*the* evidence on busing." The bias here is two-fold. First, the few studies mentioned constitute an incomplete list and are selectively negative in results. Unmentioned are at least seven investigations from busing programs throughout the nation that meet the methodological criteria for inclusion and report *positive* achievement results for black students. These seven studies are widely known, not obscure, investigations.

Second, only cursory descriptions are provided of the few investigations that are reviewed. Mitigating circumstances surrounding black responses to desegregation are not discussed. For example, we are not told that educational services for the transported black pupils were actually *reduced* with the onset of desegregation in three of the cited cities. In addition, negative findings consistent with the paper's anti-busing thesis are emphasized, while positive findings from these same cities are either obscured or simply ignored. Newer studies from three of the cited cities showing more positive results are not discussed.

Positive findings are also obscured by the utilization of an unduly severe standard. Black achievement gains must be statistically significantly greater than white gains for the paper to regard "busing" a success. But such a standard ignores the possibility that *both* racial groups can make meaningful educational advances in interracial schools. Indeed, this possibility actually occurs in three of the cities mentioned by Dr. Armor. Yet he does not inform us of this dual success of desegregation; rather

"busing" is simply rated a failure because the black children did not far outgain the improving white children.

The paper's anti-busing conclusions rest primarily, however not on the incomplete review of the available evidence but on the findings from one short-term study conducted by Dr. Armor himself. This investigation focused on a voluntary busing program in metropolitan Boston called METCO. Yet this study is one of the weakest reported in the paper, for our reexamination of its data finds that it is rife with methodological defects.

Two of the major problems concern deficiencies of the control group employed. To test the effects of "busing" and school desegregation, the control group must obviously consist exclusively of children who are neither "bused" nor attended segregated schools. But our check of this critical and elementary point reveals that this not the case. Among the 41 control students at the junior and senior high school levels, records on 39 were available; and they reveal that only 16 (41%) of these 39 actually attended segregated schools in the tested year of 1968-1969. And most of the 23 desegregated children utilized buses and other forms of vehicular transportation to get to school.

Incredible as it sounds, then, Dr. Armor compared children who were bused to desegregated schools with other children many of whom were also bused to desegregated schools. Not surprisingly, then, he found few differences between them. But this complete lack of controls renders his METCO research of no scientific interest in the study of "busing" and school desegregation. And since this METCO investigation furnished the chief "evidence" against "busing," Dr. Armor's conclusions are severely challenged by this point alone.

Serious, too, is an enormous non-response rate in the second test administration, a problem alluded to by Dr.

Armor only in a footnote. The achievement results for junior and senior high students are rendered virtually meaningless by the participation of only 44% of the eligible METCO students and 20% of the eligible "control" students. For the elementary students, only 51% of the eligible METCO students and 28% of the eligible "control" students took part in both of the achievement test sessions. Compare these percentages to the generally accepted survey standard of 70 to 80%, and one can appreciate the magnitude of the selection bias introduced into the METCO results by the widespread lack of participation in the research. Efforts to compensate for these high non-response rates through the use of cross-sectional samples that also suffer from extensive non-response are insufficient.

There are other problems in the METCO study. Besides recording and clerical errors in the data, children were included who initially performed as well as the test scoring allowed and therefore could not possibly demonstrate "improvement" later. In fact, these students comprise one-sixth of all the junior high pupils tested for achievement gains. Moreover, the third administration of the attitude tests were different for the two groups. The METCO students took the tests at school and the "control" students took them at home with their parents as proctors. This faulty research design makes any conclusion about differences in racial attitudes between the two groups hazardous. These and other severe weaknesses of the METCO research, then, are so extensive as to render its findings of no importance in any review of "the evidence on busing."

The inadequate discussion of the METCO study in the article makes it virtually impossible for even the discerning reader to evaluate it properly. We uncovered its many errors only from unpublished earlier materials and from

reanalyzing the data ourselves. And this discussion is inadequate in other ways. Differential statistical standards are employed, with less rigorous standards applied to findings congruent with the article's anti-busing thesis. Differences between METCO schools are not shown; and misleading claims of consistency with other research findings are made.

From this assortment of "evidence," Dr. Armor concludes authoritatively that "busing" fails on four out of five counts. It does not lead, he argues, to improved achievement, grades, aspirations, and racial attitudes for black children; yet, despite these failures, he admits that desegregated schools do seem somehow to lead more often to college enrollment for black students.

We review each of these conclusions in detail in our full piece, and find that the picture is considerably more positive, as well as more complex, than that printed by Dr. Armor. For example, when specified school conditions are attained, competent research has repeatedly shown that desegregated, compared to segregated, schools improve the academic performance of black pupils. Other research has demonstrated that rigidly high and unrealistic aspirations actually deter learning; thus, a slight lowering of such aspirations by school desegregation can lead to better achievement and cannot be regarded as a failure of "busing." And "militancy" and "black consciousness and solidarity" are not negative characteristics, as the article asserts, and their alleged development in desegregated schools should be regarded as a further success, not a failure, of "busing." Moreover, the evidence that desegregated education sharply expands the life opportunities of black children is more extensive than indicated in the article.

Consequently, Dr. Armor's sweeping policy decision against "mandatory busing" is neither substantiated nor

warranted. Apart from the impairments and incompleteness of the cited "evidence," the paper in a real sense is not about "busing," much less "mandatory busing." Three of the cities discussed, including the primary discussion of Boston, had *voluntary,* not "mandatory," "busing." "Busing" was never cited as an independent variable, and many of the desegregation studies discussed involved some children who were not "bused" to reach their interracial schools. Indeed, in Dr. Armor's own investigation of METCO, many of the METCO children were not "bused" while many of the "controls" were.

Finally, objections must be raised to the basic assumptions about racial change that undergird the entire article. The racial desegregation of the public schools is regarded as largely a technical matter, a matter for social scientists more than the courts to decide. The emphasis is placed solely upon the adaptive abilities of black children rather than on their constitutional rights. The whole national context of individual and institutional racism is conveniently ignored, with inter-racial contact under any conditions assumed to be "integration." We are surprised such assumptions still prevail in social science in 1972; and we trust that readers will not judge the potential usefulness of competent social research to public policy by this unfortunate example.